The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Environmental Tectonics Corporation--Reconsideration

File: B-225474.2; B-225474.3; B-225474.4

Date: April 9, 1987

DIGEST

1. Decision is affirmed on reconsideration where new evidence furnished by the agency nevertheless fails to establish that the General Accounting Office (GAO) erred in concluding that the agency had improperly accepted an unexcused late modification to a proposal taking exception to material terms and conditions of the solicitation.

2. GAO sees no basis to reconsider the appropriateness of its recommended corrective action--the reopening of competitive range discussions--since that remedy preserves the integrity of the competitive procurement system while providing the maximum degree of fairness to all parties.

DECISION

Environmental Tectonics Corporation (ETC), the Department of the Navy, and CACI, Inc.--Federal request reconsideration of our decision in Environmental Tectonics Corp., B-225474, Feb. 17, 1987, 87-1 CPD ¶ ___. We sustained a protest by ETC against the award of a contract to CACI under Navy solicitation No. N62477-85-R-0295, a procurement for services to overhaul the PVA-2 hyperbaric facility at the Naval Diving and Salvage Training Center, Panama City, Florida.

We affirm our prior decision with its recommendation for corrective action. Upon reconsideration, we conclude that the parties have failed to show that our February 17 decision contains errors of fact or of law which warrant its reversal or modification.

BACKGROUND

ETC's original ground for protest was the complaint that the Navy had failed to conduct meaningful discussions with the firm as a competitive range offeror before awarding the contract to CACI. We did not specifically reach this issue in deciding the protest because, upon review of the administrative record as furnished to us by the Navy, it became apparent that the award to CACI was based on the agency's improper acceptance of a late modification to CACI's best and final offer.

The record disclosed that CACI had attached a submission entitled, "Terms, Conditions and Assumptions" to its initial proposal of July 30, 1986, an attachment which indicated that the firm was imposing additional conditions on the government and taking exception to various provisions of the solicitation, principally with regard to delivery/acceptance terms and required warranties. The documents of record revealed that the Navy had expressly cautioned CACI in the agency's September 15 request for a best and final offer from the firm that these nonconforming terms and conditions were unacceptable and, if not withdrawn, would preclude the firm's offer from award consideration. The record further showed that CACI did not affirmatively withdraw the material qualifications created by the attachment to its initial proposal until more than a week after the September 22 closing date for receipt of best and final offers. To us, it was obvious that this withdrawal, in the form of a letter to the contracting officer dated September 30, was neither submitted with the firm's best and final offer nor was merely the confirmation of an earlier withdrawal. We noted that the letter was only dated the same date as that of award, and CACI specifically stated in the letter that, "CACI . . . hereby withdraws its exceptions . . . ." (Emphasis supplied.)

Accordingly, we concluded that the Navy had erred in awarding CACI the contract since, under the Navy's own previous determination, the firm's best and final offer was unacceptable due to the fact that it still contained the material qualifications introduced into the proposal nearly 3 months earlier. The September 30 withdrawal letter was ineffective to remove the offending terms and conditions because it was not submitted until after the September 22 closing date and was not an excusable late modification.1/

We recognized that we were sustaining the protest on a ground not expressly raised by ETC, but we determined that the firm could not have learned of this protest basis in the absence of any indication that the documents establishing the existence of the impropriety had ever been furnished to ETC with its copy of the agency report. In terms of remedial action, we recommended to the Secretary of the Navy that

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1/ As noted in our prior decision, a late proposal modification may be considered only where (1) the lateness is due solely to government mishandling or (2) the modification makes the terms of an "otherwise successful proposal"--that is, the proposal of the offeror already in line for award--more favorable to the government. Federal Acquisition Regulation, 48 C.F.R. §§ 52.215-10(c) and (f) (1985).

discussions be reopened with the competitive range offerors and that CACI's contract be terminated for the convenience of the government if it was not the successful offeror at the conclusion of those discussions.

RECONSIDERATION POSITIONS

Navy/CACI

The Navy, joined by CACI, urges that our prior decision be reconsidered on the ground that facts not known to this Office at the time now demonstrate that CACI had timely withdrawn the material qualifications from its proposal. The Navy notes that the original administrative record contained only CACI's September 30 letter of withdrawal, which we viewed as an unacceptable late modification to its best and final offer. However, the Navy now introduces for our consideration two earlier documents transmitted between the agency and CACI which the Navy contends served to remove the unacceptable conditions from CACI's proposal.

The first document is a letter from the contracting officer to CACI dated September 15, the same date as her letter to the firm requesting a best and final offer. It is now apparent that this letter was enclosed with the contracting officer's best and final offer request and is the document referenced therein as the "Order of Precedence."

The "Order of Precedence" document is comprised of two separate sections, the top section signed by the contracting officer and stating in part:

> ". . . It is requested that this letter, affirming that the Government specification has precedence over the technical proposal in all technical areas be signed by the corporate officer and returned to this office by 22 September 1986, 2:00 p.m."

The bottom section of the "Order of Precedence" is endorsed by an officer of CACI and is dated September 17, providing:

> "I do hereby agree that should CACI, Inc.,-Federal be awarded subject contract, the Government specification shall take [precedence] over the CACI, Inc.-Federal proposal in all technical areas."

The next document now submitted by the Navy is a letter of September 22 from CACI to the contracting officer which was the cover letter to CACI's best and final offer of the same date. This letter transmits the best and final offer

and references the September 15 "Order of Precedence" document which CACI states is enclosed and has been executed by the firm.

Accordingly, the Navy and CACI contend that CACI's execution of the "Order of Precedence," and the submission of that document with its best and final offer, was an act sufficient to remove the unacceptable conditions from its proposal.

With regard to CACI's September 30 letter expressly withdrawing those conditions after the closing date for best and final offers--the document which was the touchstone of our prior decision--the Navy, through an affidavit from the contracting officer, explains that CACI's endorsement of the September 15 "Order of Precedence" "reflected our agreement during [previous telephonic] discussion that the conditions were removed." However, the contracting officer states that she became concerned that if a contract dispute arose later during performance, CACI's cover letter of September 22 and the endorsed "Order of Precedence" might have to be proven through parol evidence as actually reflecting the parties earlier agreement that the offending terms would be withdrawn. Accordingly, the contracting officer advises that she requested CACI to submit a letter "specifically stating that the conditions were removed." The September 30 letter is explained as CACI's response to this request, and although the contracting officer recognizes that it was submitted after the best and final offer closing date, she nevertheless avers that she "already understood" that the conditions had been removed through CACI's execution of the September 15 "Order of Precedence" and submission of that document with its best and final offer.

ANALYSIS

To the extent our prior decision was based upon an original administrative record from which we reasonably would draw the least favorable conclusion as to the legal sufficiency of the Navy's award to CACI, it is the general rule that parties to a protest that fail to submit all relevant evidence do so at their peril. See J.R. Youngdale Const. Co., Inc.--Request for Reconsideration, B-219439.2, Feb. 20, 1986, 86-1 CPD ¶ 176. Nevertheless, we agree with the Navy's position that it should not be held responsible for failure to submit those documents the agency now asserts were necessary to our full understanding of that record, because the Navy had no actual knowledge of the issue upon which we would ultimately sustain ETC's protest. Therefore, we will accept for review the evidence which the Navy submits for the first time upon reconsideration.

However, we reject the Navy's assertion that we had no jurisdiction to decide the case on a ground other than that raised by ETC in its protest. The Competition in Contracting Act of 1984 (CICA) empowers this Office to determine, in response to a protest submitted by an interested party, whether a solicitation, proposed award, or award complies with statute and regulation and to recommend the appropriate remedy if the procurement action in question was improper. 31 U.S.C. §§ 3553(a); 3554(b)(1) (Supp. III 1985). We know of nothing in the CICA that compels this Office to ignore an obvious procurement impropriety--in derogation of our statutory authority--even though the protest submission itself may not have specifically brought forth the matter.

As to the merits, we do not agree that CACI's execution of the September 15 "Order of Precedence" and the submission of that document with its best and final offer effectively removed the offending conditions from its proposal. The "Order of Precedence" was clearly limited in its scope by providing that the government specification would take precedence over CACI's proposal "in all technical areas." (Emphasis supplied.) However, as noted earlier, the major thrust of CACI's July 30 proposal attachment was an attempt to condition certain delivery/acceptance terms and warranty provisions, rather than to substitute any appreciable number of its own technical specifications for the work in place of the government's. It is arguable that CACI's stated desire in the attachment that the government provide electrical utilities to a junction box at the facility was a "technical area" condition removed by virtue of CACI's execution of the "Order of Precedence" document. However, in contrast, we fail to see that this act removed the explicit qualifications to the standard delivery/acceptance terms and warranty provisions of the solicitation, which are generally viewed as material requirements which must be met without such qualification. See Granger Assocs., B-222855, Aug. 11, 1986, 86-2 CPD ¶ 174.

For example, the solicitation provided at clause E3.(j) that the government would accept or reject supplies "as promptly as practicable after delivery . . . ." However, CACI proposed a 30-day limit for the government to respond to or comment on the CACI deliverable, and, in the event CACI did not receive the government's reponse within the 30-day period, this imposed term provided that, "CACI shall consider the deliverable to have been considered acceptable by the government." In our view, this constituted a qualification in the firm's proposal giving it greater rights than contemplated by the solicitation and which, because it was

not strictly related to the "technical" aspects of the work, was not embraced by the firm's execution of the "Order of Precedence."

We also note that CACI had demanded in its July 30 proposal attachment that clause H4.(b)(2) of the RFP "[be stricken] in its entirety." This clause was a restatement of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.246-18(b)(2) (1985), which provides that, with respect to supplies of a complex nature, any corrected or replacement supplies/parts furnished by the contractor are to be subject to the same warranty conditions as supplies/parts initially delivered. Again, we do not believe that CACI's agreement that the government's specifications would control over its own "in all technical areas" was adequate to withdraw the exception taken to this standard term of the RFP, a term material to the government's interest.

Our conclusion that CACI's execution of the "Order of Precedence" document failed to withdraw the nonconforming qualifications from its offer is borne out by the fact that the Navy nevertheless found it necessary, in assurance that the government's rights would be protected should a contract dispute later arise, to secure from CACI an affirmative withdrawal of those offending terms and conditions. Despite the contracting officer's assertion that she "already understood" that CACI's execution of the "Order of Precedence" document had removed the conditions, reflecting the agreement reached between the parties during previous telephone conversations that CACI would in fact do so, we continue to believe that CACI's usage of the present tense in its September 30 letter--"CACI hereby withdraws its exceptions"--without reference to either its endorsement of the September 15 "Order of Precedence" or any previous oral agreement, means that from a legal standpoint, the September 30 letter alone constituted CACI's dispositive act of withdrawal.

In this regard as well, we note that the contracting officer's September 15 letter requesting a best and final offer and a withdrawal of the imposed conditions makes no statement whatsoever that CACI's execution of the enclosed "Order of Precedence" would in fact constitute the requested withdrawal. Instead, we believe that the language of this letter, given that the contracting officer's reference to the "Order of Precedence" only appears at the end in a sentence beginning with the words, "In addition . . .," clearly suggests that the contracting officer at some point contemplated a separate, affirmative withdrawal by CACI. Hence, we

believe that CACI's execution and submission of the "Order of Precedence" must be viewed as only an adjunctive act insufficent by itself to render the firm's September 22 best and final offer acceptable.

Accordingly, the Navy and CACI have failed to meet their burden to establish that our prior decision erred in holding that the agency had awarded CACI the contract on the basis of an unacceptable offer that legally could not be cured by the firm's untimely withdrawal letter of September 30. See Department of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13.

Moreover, the fact that the contracting officer admits that "numerous" communications between the Navy and CACI took place concerning the removal of the conditions is further evidence that the award was improper, and lends support to ETC's original complaint that, as a competitive range offeror, it was not afforded meaningful discussions. In this regard, discussions, as opposed to clarifications, are defined by regulation as any oral or written communications between the government and an offeror involving "information essential for determining the acceptability of a proposal." FAR, 48 C.F.R. § 15.601(a) (1986). Clearly, the communications occurring here materially related to the acceptability of CACI's proposal and, therefore, constituted discussions. It is well-settled that if discussions are held with any one offeror within the competitive range prior to award, meaningful discussions must be conducted with all other offerors within the competitive range as well. ALM, Inc., 65 Comp. Gen. 405 (1986), 86-1 CPD ¶ 240; University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD ¶ 201.

RECONSIDERATION POSITION

Environmental Tectonics Corporation

ETC, the prevailing party in our February 17 decision, requests reconsideration of that decision to the extent we recommended corrective action in the form of reopened competitive range discussions. ETC argues that since CACI's best and final offer was unacceptable as submitted, CACI's contract should now be terminated for the convenience of the government and an award made to ETC as the firm next in line under the RFP's stated evaluation criteria. ETC contends that a reopening of discussions will give CACI an unfair opportunity to retain a contract to which it was not entitled and will likely result in a prohibited auction situation, since it is reasonable to assume that the offerors competitive prices have been revealed.

ANALYSIS

Generally, it is true that there is no legal basis for an agency to take a course of action other than to reject an unexcused late proposal modification. See Westway Mfg. Co., Inc., B-224236, Oct. 3, 1986, 86-2 CPD ¶ 391. However, in Woodward Assocs. Inc. et al., B-216714 et al., Mar. 5, 1985, 85-1 CPD ¶ 274, a case involving our sustaining of a protest against an agency's acceptance of a late modification to a best and final offer, we declined to recommend corrective action in the form of an award to the protester, but instead recommended that discussions be reopened with the two competitive range offerors. We did so because it appeared that the firm submitting the late modification may have been misled by the agency concerning its opportunity to revise its proposal in response to the agency's request for best and final offers. We think that our rationale in Woodward is applicable to the situation here.

In our February 17 decision, we recommended a reopening of discussions rather than an award to ETC because we were sustaining the protest on a ground not expressly raised by ETC and without benefit of the agency's full version of events. Even with those facts now before us, we still believe that it would be inappropriate to recommend a termination for convenience and an award to ETC where it is apparent that CACI, as a result of its discussions with the contracting officer, was led to believe that its endorsement of the "Order of Precedence" document would be legally sufficient to withdraw the material qualifications from its proposal as requested by the Navy.

To the extent ETC urges that our recommendation will result in an improper auction, we note that our prior decision appropriately made no mention of any of the offerors' prices, and we see no indication that prices were exposed during the exchange of written submissions as part of the protest proceedings or otherwise revealed. ETC's concern as to price disclosure appears unwarranted, see Furuno U.S.A., Inc.--Request for Reconsideration, B-221814.2, June 10, 1986, 86-1 CPD ¶ 540, and, in any event, we have held that the risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through the taking of appropriate corrective action. Roy F. Weston, Inc.--Request for Reconsideration, B-221863.3, Sept. 29, 1986, 86-2 CPD ¶ 364. Here, we believe that a reopening of discussions

preserves that integrity with the maximum degree of fairness to all parties.

Accordingly, our prior decision with its recommendation for corrective action is affirmed.

for Milton J. Socolar
Comptroller General
of the United States